Hock Hua Bank Bhd v Choo Meng Chiong & Anor

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 24-40 OF 1998
TEE AH SING J
4 JANUARY 1999

Bankruptcy *— Capacity of bankrupt — Whether bankrupt had capacity to charge land as security for loan*

Land Law *— Charge — Order for sale — Charge created by bankrupt as security for loan — Charge registered before any transmission was registered by Official Assignee — Whether bankrupt's interest passed to plaintiff — Whether Official Assignee should be made a party to proceedings for order for sale*

The plaintiff made this application for an order for sale under s 148(2) of the Land Code (Sarawak) ('the Land Code') on the property charged in favour of it, executed by the first defendant as a security for the repayment of the sum of RM60,000 advanced to him by the plaintiff. Before the hearing commenced, the Official Assignee (the second defendant) objected to the originating summons on grounds that the charge was illegal and void as against him as it was created after the first defendant was adjudged bankrupt. It was contended that by virtue of s 24(1) of the Bankruptcy Act 1967 ('the BA'), the property charged had vested in the Official Assignee and became divisible upon the first defendant's bankruptcy. The court had to determine whether the defendant, as a person adjudged bankrupt, had the capacity to charge the land to the plaintiff. The Official Assignee also raised an objection in that the Official Assignee need not be named as a party for the foreclosure action but only need to be extended a copy of such proceeding.

Held, allowing the plaintiff to proceed against the first defendant for an order for sale:

(1) Under s 169(1) of the Land Code, land and interests in land belonging to the bankrupt vest in equity in the Official Assignee. It will only vest in the Official Assignee at law when the requirements of registration as provided under s 169(4) of the Land Code have been met. In this case, since the charge in favour of the plaintiff had been registered before any transmission was registered by the Official Assignee, the bankrupt's interest would, notwithstanding his bankruptcy, pass to the plaintiff. Further, the BA does not prohibit a bankrupt from entering into a contract to charge the land to the plaintiff, nor does the Land Code prohibit a bankrupt from being registered as a proprietor of land and dealing in land or interests in land. Therefore, the first defendant had the capacity to charge the land to the plaintiff (see pp 318F–G and 319C–D).

(2) The charge was not void as against the Official Assignee. Even if the Official Assignee had the locus standi to invoke the fraud

exception under s 132 of the Land Code, the Official Assignee had not proven fraud. Therefore, the charge was valid as against the Official Assignee (see p 319E).

(3) In the light of the express provisions of s 8(2) of the BA, the plaintiff as a secured creditor could proceed with the originating summons in the usual manner as if the first defendant was not a bankrupt for the purpose of application for an order for the sale of the land under s 148(2)(c) of the Land Code (see p 319I).

(4) The Official Assignee should not be made a party to the proceedings. Section 8(1) of the BA did not apply and there are no provisions in the Land Code or the BA that the Official Assignee be joined as a defendant in the originating summons for the sale of the land or that leave of the court was required thereof (see pp 317G and 320A).

[Bahasa Malaysia summary

Plaintif telah membuat permohonan ini untuk satu perintah jualan di bawah s 148(2) Kanun Tanah (Sarawak) ('Kanun Tanah tersebut') atas hartanah yang digadaikan kepada namanya, yang dilaksanakan oleh defendan pertama sebagai cagaran untuk pembayaran balik jumlah sebanyak RM60,000 yang diberikan kepadanya oleh plaintif. Sebelum pembicaraan bermula, Pegawai Pemegang Harta (defendan kedua) membantah terhadap saman pemula atas alasan-alasan bahawa gadaian tersebut menyalahi undang-undang dan tak sah terhadapnya kerana ia telah diwujudkan selepas defendan pertama diputuskan muflis. Ia dihujahkan bahawa disebabkan s 24(1) Akta Kebankrapan 1967 ('AK'), hartanah yang digadaikan terletakhak dalam Pegawai Pemegang Harta dan menjadi boleh dibahagikan apabila defendan pertama diputuskan muflis. Mahkamah terpaksa menentukan sama ada defendan, sebagai seorang yang muflis, mempunyai keupayaan untuk menggadaikan tanah tersebut kepada plaintif. Pegawai Pemegang Harta juga membangkitkan bantahan iaitu Pegawai Pemegang Harta tidak perlu dinamakan sebagai suatu pihak untuk tindakan melelong tetapi hanya perlu diberikan sesalinan prosiding sedemikian.

Diputuskan, membenarkan plaintif meneruskan tindakan terhadap defendan pertama untuk satu perintah jualan:

(1) Di bawah s 169(1) Kanun Tanah tersebut, tanah dan kepentingan dalam tanah kepunyaan si bankrap terletakhak dalam ekuiti dalam Pegawai Pemegang Harta. Ia hanya akan terletakhak dalam Pegawai Pemegang Harta di sisi undang-undang apabila keperluan-keperluan pendaftaran seperti yang diperuntukkan di bawah s 169(4) Kanun Tanah tersebut telah dipenuhi. Dalam kes ini, oleh kerana gadaian kepada nama plaintif telah didaftarkan sebelum apa-apa transmisi didaftarkan oleh Pegawai Pemegang Harta, kepentingan si bankrap akan, tanpa mengira kebankrapannya, beralih kepada plaintif. Seterusnya, AK tidak

melarang si bankrap daripada mengikat kontrak untuk menggadai tanah kepada plaintif, dan Kanun Tanah tersebut tidak juga menghalang si bankrap daripada didaftarkan sebagai seorang tuan punya tanah dan menguruskan hal berkenaan tanah atau kepentingan dalam tanah. Maka, defendan pertama mempunyai keupayaan untuk menggadaikan tanah tersebut kepada plaintif (lihat ms 318F–G dan 319C–D).

(2) Gadaian tersebut tidak terbatal terhadap Pegawai Pemegang Harta. Biarpun Pegawai Pemegang Harta mempunyai locus standi untuk menggunakan pengecualian fraud di bawah s 132 Kanun Tanah tersebut, Pegawai Pemegang Harta belum membuktikan fraud. Maka, gadaian tersebut adalah sah terhadap Pegawai Pemegang Harta (lihat ms 319E).

(3) Memandangkan peruntukan-peruntukan nyata s 8(2) AK, plaintif sebagai pemiutang bercagar boleh meneruskan tindakan dengan saman pemula dalam cara yang biasa seolah-olah defendan pertama tidak muflis untuk tujuan permohonan untuk satu perintah jualan tanah tersebut di bawah s 148(2)(c) Kanun Tanah tersebut (lihat ms 319I).

(4) Pegawai Pemegang Harta tidak harus dijadikan suatu pihak kepada prosiding. Seksyen 8(1) AK tidak terpakai dan tidak terdapat sebarang peruntukan dalam Kanun Tanah tersebut atau AK bahawa Pegawai Pemegang Harta dicantumkan sebagai defendan dalam saman pemula untuk jualan tanah tersebut atau bahawa kebenaran daripada mahkamah dikehendaki (lihat ms 317G dan 320A).]

Notes

For cases on capacity of bankrupt, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1598–1611.

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1471–1500.

Cases referred to

Chua Tin Hong, ex p Castrol (M) Sdn Bhd, Re [1997] 3 CLJ Supp 174 (refd)

Kwan Chew Shen t/a Syarikat Kaaf (Official Assignee of the Property of Kwan Chew Shen, a bankrupt) v Citibank NA [1987] 1 CLJ 314 (refd)

Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu) (Bankrupt) [1993] 2 AMR 48 (refd)

Official Assignee v Ngu Ung Yong [1988] 2 MLJ 264 (refd)

Tai Lee Finance Co Sdn Bhd v Official Assignee [1983] 1 MLJ 81 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 8(1), 8(2), 24(4), 36, 37, 38, 48, 49, 52, 53, 55(5)
Contracts Act 1950
Land Code (Sarawak) ss 13A, 13B, 13C, 132, 148(2)(c), 169(1), 169(4)
National Land Code 1965 s 349

Mark Teng (*Johnny Tu* with him) (*David Allan Sagah & Teng*) for the plaintiff.

Ko Fui Leong (Official Assignee's Office) for the Official Assignee Malaysia.

Cur Adv Vult

Tee Ah Sing J: In this originating summons, Choo Meng Chiong is the first defendant and the Official Assignee is the second defendant.

In para 3 of the affidavit of Chieng Huo Hie, affirmed on 19 February 1998, it was averred that, by a memorandum of charge dated 10 June 1997 executed by the first defendant and the plaintiff, and registered as Instrument No L 6746/97 at the Sibu Land Registry Office on 11 June 1997, the first defendant charged his land mentioned in the schedule thereto to the plaintiff as security for the repayment of the sum of RM60,000 advanced by the plaintiff to the first defendant.

The amount outstanding and due to the plaintiff including interest as at 30 November 1997 was RM63,272.14.

Before the hearing commenced, the representative from the Official Assignee raised an objection. He submitted that in view of s 8(1) of the Bankruptcy Act 1967 ('the BA') and in view of the High Court decision in *Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt))* [1993] 2 AMR 48, the Official Assignee need not be named as a party for the foreclosure action but only need to be extended a copy of such proceeding. The question of entering appearance does not arise. He objected to the originating summons on the grounds that when the first defendant charged the land to the plaintiff, he was already adjudged bankrupt in Bankruptcy Proceeding No 29–340–96 on 12 May 1997, whereas the property was charged to the plaintiff and registered by Instrument No L 6746/97 at Sibu Land Registry on 11 June 1997. At that material time, he was no longer the owner of the said property as by virtue of s 24(4) of the BA, the said property was vested in the Official Assignee and become divisible upon his bankruptcy. Therefore, the charge created after the first defendant was adjudged bankrupt is illegal and void as against the Official Assignee. Pursuant to s 55(5) of the BA, the plaintiff ought to deliver to the Official Assignee the said security which by law is not entitled to retain as against the Official Assignee.

Learned counsel for the plaintiff in his written submission contended, inter alia, as follows:

(1) (a) The date of the sale and purchase agreement was 28 May 1997.

(b) The loan was approved on 5 June 1997.

(c) The statutory declaration of not bankrupt was dated 10 June 1997.

(2) The BA must be read subject to the National Land Code 1965 (see *Kwan Chew Shen t/a Syarikat Kaaf (Official Assignee of the Property of Kwan Chew Shen, a bankrupt) v Citibank NA* [1987] 1 CLJ 314 and *Re Chua Tin Hong, ex p Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174).

(3) The land was purchased by the bankrupt and registered in his name after he was adjudged bankrupt. The land was charged by the bankrupt to the plaintiff after he was adjudged bankrupt.

(4) Sections 36, 37 and 38 of the BA and the Contracts Act 1950 do not prohibit a bankrupt from entering into contract to buy or sell land or to borrow money for those purposes. The bankrupt was not prohibited by the BA to enter into the said sale and purchase agreement, the transfer and the charge (see *Re Kwan Chew Shen*'s case).

(5) Void transactions are specifically provided in ss 52 and 53 of the BA and they deal with transactions done before the commencement of bankruptcy and not subsequently thereof. There are no provisions in the BA that state that contracts entered by a bankrupt after he was adjudged bankrupt are void as against the Official Assignee. Therefore, the said sale and purchase agreement, the transfer and the charge were not void as against the Official Assignee.

(6) The Land Code (Sarawak) ('Land Code') does not prohibit a bankrupt from being registered as a proprietor of land and dealing in land or interests in land (see ss 13A, 13B and 13C and generally of the Land Code).

(7) The land only became the property of the bankrupt, that is, vested in or acquired by the bankrupt after the registration of the transfer and the charge, the issuance of Form L by the land registry and the subsequent payment of the balance purchase price of the land to the vendor of the land. At that point in time, the land was encumbered with the charge.

(8) Upon the making of the adjudication order, s 24(4) of the BA only vests the property of the debtor in the Official Assignee and not those property acquired by or devolves on the bankrupt after the commencement date of the bankruptcy and before his discharge ('the after acquired property'). There is no vesting provision in the BA for the after acquired property. This is further supported by s 49 of the BA (dealing with second bankruptcy).

(9) If it is decided that the land being acquired by the bankrupt after he was adjudged bankrupt was vested in the Official Assignee, then the Official Assignee, after registered as proprietor of the land, shall take the same, subject to the charge to the plaintiff. This is because the Official Assignee can take no better title than that already held by the bankrupt (see *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 264 at p 268).

(10) Alternatively, even if it is held by this court that the after acquired property of a bankrupt is vested in the Official Assignee and that the land is not subject to the charge, it was submitted that in the case of lands under the Land Code, the Official Assignee only has an equitable interest in the same prior to the same being transmitted and registered in the name of the Official Assignee and it is subject to be defeated by the registration of subsequent interests.

In *Re Kwan Chew Shen*'s case and *Re Chua Tin Hong*'s case, it was held that in the context of lands under the Torrens system of land registration (in the present case, it is under s 169(1) and (4) of the Land Code), land and interests in land belonging to the bankrupt vest in equity (and not in law) in the Official Assignee. It will only vest in the Official Assignee at law when the requirements of the law of registration as provided by s 349 of the National Land Code 1965 (in the present case, it is s 169 of the Land Code) have been met. In order to ensure that a registered proprietor of a land who has been adjudged a bankrupt does not deal with the land before it is vested in the Official Assignee, the Official Assignee ought to caveat the land under the Land Code.

The only ground that can set aside the said memorandum of charge is fraud (see s 132 of the Land Code). This exception is to protect a person being deprived of his known existing right (see *Tai Lee Finance Co Sdn Bhd v Official Assignee* [1983] 1 MLJ 81 at p 84). The Official Assignee has no legal or equitable interests in the land, therefore the Official Assignee has no locus standi to complain.

Even if the Official Assignee has the locus standi to invoke the fraud exception under s 132 of the Land Code, the Official Assignee did not allege fraud.

Moreover, the plaintiff was a 'purchaser in good faith and for value of any interest' when dealing, has no knowledge that the bankrupt was a bankrupt as the bankrupt even affirmed a statutory declaration to state that he was not a bankrupt. The plaintiff only knew that the bankrupt was a bankrupt after everything was completed.

Section 8(1) (read with ss 8(2), 24 and 48) of the BA does not apply and there are no provisions in the the Land Code or the BA that the Official Assignee be joined as a defendant in the originating summons for the sale of the land (being a property acquired by the bankrupt after he was adjudged bankrupt) or that leave of the court is required thereof.

I shall now deal with the matter before me.

In *Re Kwan Chen Shen t/a Syarikat Kaaf (Official Assignee of the Property of Kwan Chew Shen, a bankrupt)*, his Lordship VC George J (as he then was) at p 318 said:

> Having the Torrens system in particular s 349 of the National Land Code in mind, it is obvious that s 24(4) of the Bankruptcy Act should be read subject to the requirements of s 349, as far as land and interest in land is concerned. This is not to make for s 24(4) to be pointless. Section 24(4) of the Bankruptcy Act and s 349 of the National Land Code should be read as

complementing each other. Section 24(4) in the context of the Torrens system has the effect that upon the adjudication of bankruptcy, land and interest in land belonging to the bankrupt vests in equity (and not at law) in the Official Assignee. It will only vest in the Official Assignee at law when the requirements of the law of registration as provided by s 349 have been met.

And at p 319 his Lordship said:

Sections 36 and 38 of the Bankruptcy Act set out the disqualifications and disabilities of a bankrupt. Inter alia, he may not hold certain offices, he may not sue without the sanction of the Official Assignee, he may not without the permission of the Official Assignee enter into or carry on any business, become a director (or take part in the management) of any company and so on. While he may not enter into a contract that would amount to his carrying on a business, it is significant that there is no blanket prohibition, express or implied, for a bankrupt to enter into a contract.

In the National Land Code (see s 43) it is seen that while minors are specifically precluded from the classes of persons and bodies who may move the state authority in respect of its powers to dispose of land, bankrupts are not, not even by implication. Again in respect of the creation of charges there does not appear to be any exclusion of bankrupts being chargors. Further, while persons of unsound mind are specifically excluded from being competent persons to enter into contracts by s 11 of the Contracts Act, bankrupts are not.

And at p 320 his Lordship said:

The upshot of all this is that there appears to be no blanket provision anywhere to the effect that a bankrupt is incapable of making a contract.

I agree with En Ong See Seng that the provisions of s 49 of the Bankruptcy Act for there to be a second or subsequent receiving order fortify the view that a bankrupt in fact is competent to enter into contracts other than those that he had specifically been excluded from entering into.

I am therefore of the view that the BA does not prohibit a bankrupt (ie the first defendant) from entering into the contract to charge the said land to the plaintiff. I agree with the contention of the plaintiff that the Land Code does not prohibit a bankrupt from being registered as a proprietor of land and dealing in land or interests in land (see ss 13A, 13B and 13C and generally of the Land Code). Therefore, the first defendant has the capacity to charge the said land to the plaintiff.

Section 169(1) of the Land Code reads as follows:

Whenever a proprietor, chargee or sub-lessee shall die, become bankrupt or be declared mentally disordered, the representative of such person shall present to the Registrar in Form N in the First Schedule a writeen application to be registered as proprietor, chargee or sub-lessee, together with the issue document of title and such other documents as may be necessary, and the original and a certified copy of the certificate of representation, or other satisfactory proof that he is legally entitled to be registered as proprietor, chargee or sub-lessee, as the case may be. The Registrar shall thereupon make on the Register and issue document of title and, in the case of a chargee or sub-lessee, upon the memorandum of charge or sub-lease, appropriate entries showing the nature of the certificate of representation and the circumstances under which the applicant became entitled to be registered, and shall register him as proprietor, chargee or sub-lessee accordingly.

A Section 169(4) of the Land Code reads as follows:

> Upon the registration being made pursuant to sub-s (1), the representative shall hold the land, charge or sub-lease subject to all equities affecting the same but, for the purpose of-any dealing therewith, shall be deemed to be the absolute proprietor thereof:
>
> B Provided that no charge or sub-lease executed by the representative of a deceased person shall be registered unless it has been consented to by a Probate Officer, as defined by the Administration of Estates Ordinance, or has been made under the authority of an order of a court of competent jurisdiction.

C Under s 169(1) of the Land Code, land and interests in land belonging to the bankrupt vest in equity (and not in law) in the Official Assignee. It will only vest in the Official Assignee at law when the requirements of registration as provided under s 169(4) of the Land Code have been met.

In this case, since the charge in favour of the plaintiff has been registered before any transmission is registered by the Official Assignee, D then the bankrupt's interest will, notwithstanding his bankruptcy, pass to the plaintiff (see *Re Chua Tin Hong, ex p Castrol (M) Sdn Bhd*).

I am of the view that the charge is not void as against the Official Assignee. Even if the Official Assignee has the locus standi to invoke the fraud exception under s 132 of the National Land Code, the Official E Assignee has not proved fraud. Therefore the charge is valid as against the Official Assignee.

Section 8(1) and (2) of the BA reads as follows:

> Effect of receiving order
>
> F (1) On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the G court may impose.
>
> (2) This section shall not affect the power of any secured credit to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of section 31 of the Employment Act 1955 of H the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.

I am of the view that in the light of the express provisions of s 8(2) of the BA, the plaintiff as a secured creditor can proceed with the originating summons in the usual manner as if the first defendant is not a bankrupt for I the purpose of application for an order for the sale of the said land under s 148(2)(c) of the Land Code.

So I am of the view that s 8(1) of the BA does not apply.

I am of the view that the Official Assignee should not be made a party to the proceedings. As such, I order that the Official Assignee cited as the second defendant be struck off as a party to the originating summons with costs to be taxed unless agreed. However, I overrule the other objections raised by the representative for the Official Assignee for the reasons as stated above.

The plaintiff can proceed against the first defendant under the originating summons for an order of sale under s 148(2)(c) of the Land Code.

Plaintiff allowed to proceed against first defendant for an order for sale.

Reported by Mohd Rizal Abidin